# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH

FOX TELEVISION STATIONS, INC., Respondent,

and Case 31–CA–109881

NATIONAL ASS'N OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING & CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 53 Charging Party.

J. Carlos Gonzalez, for the General Counsel. Kevin Casey and Todd A. Palo, for the Respondent.

#### **DECISION**

#### STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in West Los Angeles, California on March 10 and 11, 2014. The National Association of Broadcast Employees and Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL—CIO, Local 53 (the Union or Charging Party) filed the charge on July 24, 2013, which was later amended on September 16, and the General Counsel issued the complaint on December 31. This is a refusal to bargain in good-faith case by the Union against Respondent Fox Television Stations, Inc. (Respondent or the Company) where it is alleged that Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act). On January 17, 2014, Respondent filed its answer denying the complaint allegations.

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<sup>&</sup>lt;sup>1</sup> All dates are in 2013 unless otherwise indicated.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally and to file post-hearing briefs.<sup>2</sup> On April 15, 2014, said briefs were filed by counsel for the General Counsel and by counsel for Respondent and have been carefully considered. Accordingly, based upon the entire record here<sup>3</sup>, including the post-hearing briefs and my observation of the credibility of the several witnesses, I make the following:

#### FINDINGS OF FACT

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#### I. JURISDICTION

Respondent is a corporation owning 28 television stations in 17 markets, including a television broadcast station in Los Angeles, California where Respondent maintains an office and place of business. Respondent admits and I find that for a period of 12 months preceding September 20, 2013, Respondent in the course and conduct of its business, provided television broadcasting services valued in excess of \$100,000, and purchased and received at its California facilities, goods valued in excess of \$5,000 directly from points outside the State of California.

I further find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. (Tr. 8.)

I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act. For 30 years, the Union represented the engineering employees who work in Respondent's Los Angeles engineering unit. Additionally, the same Union represents an additional bargaining unit of 40 to 50 newsroom employees who have a separate collective-bargaining agreement (CBA) with the Respondent.

#### II. BACKGROUND

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Respondent and the Union have had a successful bargaining relationship spanning from at least 1988 to 2008. For 2 years, beginning in late May 2011 until the summer of 2013, the

<sup>&</sup>lt;sup>2</sup> For ease of reference, testimonial evidence cited here will be referred to as "Tr." (Transcript) followed by the page number(s); documentary evidence is referred to either as "GC Exh." for a General Counsel exhibit, and "R. Exh." for a Respondent exhibit; and reference to the General Counsel's post-hearing brief shall be "GC Br." for the General Counsel's brief, followed by the applicable page numbers; and the same for Respondent's post-hearing brief referenced as "R. Br." Charging Party did not file a post-hearing brief. Citations to the record are not meant to be exhaustive or exclusive.

<sup>&</sup>lt;sup>3</sup> I hereby correct the transcript as follows: Tr. 7, lines 4-5: "there's full settlement" should be "there's not a full settlement"; Tr. 10, line 8: "eight" should be "agent"; Tr. 17, line24: "not fie" should be "notify"; Tr. 18, line 3: "at the material" should be "at the bargaining table"; Tr. 18, line 10: "patients" should be "patience"; Tr. 22, line 12: "even" should be "every"; Tr. 29, line 12: "may" should be "May"; Tr. 30, line 36, line 17: "notion" should be negotiation"; Tr. 37, line 19: "facile till" should be "facility"; Tr. 53, line 3: "I" should be "A"; Tr. 54, line 16: "sessions" should be "see"; Tr. 91, line 7: "specifically about" should be "specifically say about"; Tr. 99, line 17: "sensitivity" should be "sense"; Tr. 102, line 8: "aggressive" should be "regressive".

parties negotiated for a successor agreement to the previous July 1, 2008 to June 30, 2011 CBA covering the engineers at Respondent, including 57 staff engineers and 20 daily engineers.

Respondent contends that it sought to make significant changes to the expiring CBA based on the nationwide recession and economic changes that had occurred in the television industry between 2000 and 2011. Respondent professes that as cable television and internet use has expanded, advertisers have found various alternative platforms through which to advertise and subsequently spent less of their overall advertising dollars on television networks. Furthermore, it is Respondent's position that with more people getting their news from the internet and Hispanic or Asian cable news channels, viewership of local news channels has decreased dramatically in the preceding years.

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Respondent believed that there were new competitors in the market who could produce programming more cheaply and efficiently, forcing Respondent to alter the proposed successor CBA it offered to the Union in order to stay competitive in the market. The Union believed that Respondent was simply looking to unnecessarily cut costs and employee benefits. Although the Union acknowledged increased news competition, decreased television ratings, and decreased advertisement revenue, it emphasized that Respondent never claimed it was unable to pay the wages and benefits the Union sought or that the business was no longer making a profit.

# A. Successor Agreement Bargaining Sessions

For over 2 years beginning in May 2011, until the summer of 2013, the parties negotiated for a successor CBA to the preceding CBA which was expiring in June 2011. The bargaining process entailed 28 bargaining sessions, the exchange of 700 pages of documents, dozens of telephone conversations, several exchanged proposals via email, a variety of tentative agreements, as well as numerous off-the-table discussions.

On May 31, 2011, the bargaining committees for Respondent and the Union officially began negotiating a successor CBA proposal to replace the agreement set to expire on June 30, 2011. Respondent presented its initial proposal to the Union, seeking major reductions in employment benefits and dramatically altered the terms and conditions of employment for the engineers' unit (R. Exh. 7.) On June 3, 2011, the Union countered with its own initial proposals (R. Exh. 8.) Later on June 27, 2011, 3 days before the original agreement expired, the Union proposed that the parties extend the current agreement while they continued to negotiate further modifications. Both sides agreed and established that either party could terminate this extension with 30 days' notice (GC Exh. 3.)

On August 17 and 18, 2011, the parties met in Los Angeles for bargaining sessions where the Union presented a proposal rejecting all of Respondent's initial demands (R. Exh. 9.) The parties continued to bargain between August 2011 and January 11, 2012, when they met again in Los Angeles and Respondent presented the Union with another proposal (R. Exh. 10.)

From May 31, 2011 to January 11, 2012, the parties had reached over 30 tentative agreements on mostly noneconomic modifications. The January 11, 2012 proposal presented by Respondent significantly modified the Respondent's position more favorably to the Union on four of its nine priority proposals in relation to Respondent's initial May 31, 2011 proposal.

On January 23, 24, and 25, 2012, the parties met again in Los Angeles for bargaining sessions. On January 25, 2012, the Union presented a counter proposal to Respondent's January 11, 2012 proposal, rejecting the majority of the Company's proposals (R. Exh. 11.)

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Between May 1, 2, and 3, 2012, the parties met again in Los Angeles for bargaining sessions. On May 2, 2012, Respondent presented its proposal after 1 year of bargaining. (R. Exh. 12.) This proposal explicitly stated that it was Respondent's final offer to the Union. It included all tentative agreements from the January 11, 2012 proposal with 13 modifications affecting six of the company's nine priority proposals.

Between July 17, 18, and 19, 2012, the parties met again in Los Angeles for bargaining sessions. On July 17, 2012, the Union offered Respondent an off-the-record counterproposal to Respondent's May 2, 2012 offer proposal (R. Exh. 13.) The Union rejected every one of Respondent's nine proposals, however, it offered counters.

## B. The November 2012 CBA Proposal

During October and November 2012, the parties engaged in various off-the-record negotiations. The Union requested modifications be made to the May 2, 2012 proposal before the bargaining committee would agree to present the proposal to its membership. Between October 3, 2012 and November 26, 2012, the Union bargaining committee agreed that the proposal was ready to be presented to the union members for ratification.

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On November 26, 2012, Respondent sent the Union a "Draft Memorandum of Agreement" incorporating the promised changes to the May 2, 2012 proposal (the November 2012 CBA Proposal) in exchange for the Union's commitment its bargaining committee would recommend that the union members ratify the agreement (R. Exh. 15.) At this time, Respondent took the position that the parties had reached a deal—it argued that it had made many concessions to all nine of its original priority proposals in order to reach an agreement.

On November 30, 2012, with the full recommendation of the Union's bargaining committee, the 71 page November 2012 CBA Proposal (GC Exh. 2.) was presented for ratification to the union members, but was "overwhelmingly rejected" (R. Exh. 3.) The Union subsequently notified Respondent of the failed vote.

#### C. Additional Successor CBA Bargaining Sessions

After the failed ratification vote, Respondent had lost confidence in the Union's bargaining committee and its influence on the bargaining unit. Respondent felt that the union bargaining committee had either misled them or simply did not know what the membership was interested in and would approve.

On December 14, 2012, Respondent sent the Union a letter informing them that
Respondent was terminating the June 27, 2011 extension agreement as of January 17, 2013, due to the rejection of the November 2012 CBA Proposal by the union membership. Respondent used this action as a negotiating tool to pressure the Union into reaching an agreement (GC Exh.

3.) Furthermore, in January 2013, Respondent attempted to get the Union's national office involved in the bargaining process.

On January 15, 16, and 17, 2013, the parties met again in Los Angeles for bargaining sessions. The national union president and vice president had agreed to attend these sessions; however, on January 15, 2013, the national president called in sick and informed the parties that he would not be attending the sessions. However, he informed Respondent that the national vice president would still attend. While the national vice president had already travelled to Los Angeles, he was only available for off-the-record discussions on January 15, 2013, and half of the day on January 16, 2013.

On January 17, 2013, the Union presented a new proposal more favorable to the Union as compared to the November 2012 CBA Proposal. Although the Union completely rejected six of Respondent's eight remaining priority issues, it did agree to a few provisions. (R. Exh. 16.)

Between January 17, 2013 and May 17, 2013, Respondent and Union had a series of off-the-record communications to attempt to further modify Respondent's proposal so that the Union could present an acceptable CBA to the membership for vote. (GC Exh. 4.)

In April 2013, the Union's bargaining committee told Respondent that if they focused on just one or two priority items, they would have better luck achieving ratification by the members. Respondent worked with the Union and made a series of concessions and withdrawals in order to reach an agreement, taking the Union bargaining committee's advice and focusing on only two priority issues.

### D. The Late April/Early May 2013 Negotiation Emails

As part of the running negotiations for both sides, a series of emails floated back and forth from April 30 to May 10, 2013.

On April 30, 2013, Kevin Casey for Respondent wrote to Eric Seggi for Union the following email:

Eric.

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This is a follow-up to our off the record discussion earlier today.

Without written recommendation from Local 53's officers, the Company is agreeable to putting the terms it agreed to last week before the Engineering bargaining unit employees

for a ratification vote only under the following conditions:

- 1. A package document containing agreed upon terms in the form of an offer from the Union's bargaining committee shall be shared with all bargaining unit employees.
- 2. Union's bargaining committee, including, Cheryl, Tim, Pat and Eric, shall sign a written recommendation of the package distributed to all bargaining unit members

3. Company shall provide a written coversheet for the package stating that the Company agrees to accept the terms of the package provided it is ratified by June 1, 2013. If the package is not ratified by June 1, 2013, the Company's offer in these negotiations shall remain the same as set forth in its November 26, 2012 Package Proposal including, but not limited to, the following proposals: one hour unpaid meal period, workday changed from a total of 8 hours to 8.5 hours with paid hours of work reduced from 8 hours paid to 7.5 hours paid per day, daily employee premium pay reduced from 20% to 12.5%, end of night shift differential period changed from 7 a.m. to 6 a.m., holiday premiums reduced from 5 to 4 and vacation entitlement reduction effective in 2013.

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Please let me know if you have any questions.

On May 6, 2013, Seggi responded to Casey's email as follows:

15 Kevin,

The Union is agreeable to the proposed terms of the package, conditions regarding ratification and the Company's fallback position in the event the package is not ratified by June 1, 2013, provided the Company agrees and recognizes that the Union retains the right to withdraw agreement on any and/or all of the tentatively agreed upon items. Further, the Company agrees and recognizes that the Union retains the right to introduce new, additional and/or modified proposals in the event the package is not ratified by June 1, 2013.

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Please let me know if the Company is agreeable to the Union's proposal – if so, we can discuss the package document and logistics of putting together a ratification meeting

Thank you,

30 Eric

On May 10, 2013, Casey wrote to Seggi in response:

Eric,

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The Company agrees to the terms you mention in your email ... [above]. The Company agrees that the Union is not waiving its right to withdraw agreement to tentatively agreed items or introduce new, additional or modified proposals if no ratification occurs. Similarly, the Company does not waive its right in this regard, including the right to claim regressive bargaining if it believes the Union engages in such conduct. I was tied up in an arbitration hearing out of town earlier this week, but I will send you a proposed document, including the coversheet and package, by Monday or Tuesday of next week. The Company would like to also have a negotiating meeting scheduled with the Engineering unit for shortly after the ratification in case the package is not ratified and I understand from one of your last messages that you may have some dates in June that would work.

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Let's discuss the logistics of a ratification vote when you have time. I am in my office in NY today and Monday

Thanks,

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Also on May 10, 2013, Seggi wrote to the Union's Ross:

**FYI**, I am going to call him Monday regarding dates \$ logistics. I advised him that we may request a little more time to ratify.

(GC Exh. 7.)

Seggi understood the May 10 email from Casey to mean that if the Union later initiated new or modified proposals, the Respondent could challenge them as regressive or make a claim that they were regressive. (Tr. 102.)

# E. The Conditional May 2013 CBA Proposal

On May 17, 2013, the two sides agreed that the final conditions contained in the cover letter signed off by all 4 union bargaining committee members and attached to the May 17, 2013 CBA Proposal (Conditional May 2013 CBA Proposal) being presented to the union membership for the ratification vote were as follows:

(1) The Union's bargaining committee must once again agree to recommend the proposal to the members for ratification;

- (2) the Union's recommendation must be in writing and signed by all members of the bargaining committee;
- (3) The Union's bargaining committee must put in writing that it understands that Respondent will only agree to the proposal if it is ratified by the union members by June 14, 2013; and
- (4) the Union's bargaining committee must acknowledge that *if the proposal is not ratified by June 14, 2013 then the Respondent will revert back to the November 2012 CBA Proposal* (Tr. 50–52, 108; GC Exh. 5.)(Emphasis added.)

The cover letter to the voting union members also explicitly stated that Respondent's 70 page Conditional May 2013 CBA Proposal was better than Respondent's November 2012 CBA Proposal, and that the union bargaining committee believed that the Conditional May 2013 CBA Proposal was a fair resolution to this conflict. (GC Exh. 4.) Specifically the cover letter provided a comparison of some of the key economic points in both CBA's and disclosed to the union members the following:

	11/26/12 Package	5/17/13 Package
Length of Workday	7.5 hours paid	8 hours paid
Meal Period	30 minutes <u>un</u> paid	1 hour paid
Meal penalty	Reduced to \$10	Stays at \$13
Daily Employee Premium	Reduced to 12.5%	Stays at 20%
	Meal Period Meal penalty	Length of Workday  Meal Period  Meal penalty  7.5 hours paid 30 minutes unpaid Reduced to \$10

Night Shift Differential Period Midnight to 6 a.m. Holidays Reduced to 4 Stays at 5
Holiday Premium Days Reduced to 3 Stays at 5
Elimination of 6<sup>th</sup> vacation week NABET/LATSE ENG Cross Util. No balancing required S-day balancing required

As you can see, the Union's May 17, 2013 package represents significant improvements relative to the Company's November 2012 offer. We believe it represents a fair resolution to these contract negotiations and, therefore, Unanimously recommend it.

(Tr. 54-63; GC Exh. 5.)

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In addition to the terms comparison above, the May 17 proposal included a 4.5 percent wage reduction upon ratification with a 1.25 percent wage increase in two years versus a 6.25 percent wage cut followed by a 4.5 percent wage increase in later years. (Tr. 61-63; GC Exhs. 2 and 4.)

Nonetheless, the local union president and vice president refused to recommend the proposal although, as stated above, all 4 of the Union's bargaining committee members again recommended ratifying it to their members.

On May 20, 2013, Respondent by Casey emailed the Union by Seggi that:

Hi Eric – I received your voicemail message this morning Even if Engineering unit ratifies a contract, we would like to keep all three dates in July and use them all for Newsroom instead. We will plan on meeting on Tuesday, July 9 through Thursday, July 11. I would fly to LA on Monday July 8 or early morning on Tuesday July 9 and leave on red eye on Thursday evening Thanks

(GC Exh. 8.)

# F. The June 2013 Union rejection vote and the June 21, 2013 Respondent letter

The parties had no prior agreement as of May 17 to continue bargaining in the event on non-ratification of the Conditional May 2013 CBA Proposal. In addition, the Union never requested more time to ratify the Conditional May 2013 CBA Proposal. (Tr. 295.)

During the first week of June 2013, the union bargaining committee and the local union president held a meeting with approximately 40 union members in a restaurant to discuss and explain the Conditional May 2013 CBA Proposal prior to the ratification vote. Ross admits that a lot of the members in attendance "were concerned that, you know, because this [May 2013 CBA Proposal] was the second package [after the November 2012 CBA Proposal], if they [the Union members] didn't vote and ratify this package what could happen?" (Tr. 147.) Although he was aware of the agreed upon cover letter conditions placed on the rejection of the Conditional May 2013 CBA Proposal which brought back to play the November 2012 CBA Proposal, the local

Union President Ross told the members in response only that if the vote on the Conditional May 2013 CBA Proposal failed, "we do have some bargaining dates scheduled on July 9 and 10, 2013]. (Tr. 147-148; GC Exh. 5.) Ross further admits, however, but apparently did not explain to the Union members at the restaurant, that he understood the May 17 cover letter condition that if the November 2012 CBA Proposal came back to play after a rejection vote of the Conditional May 2013 CBA Proposal, the November 2012 package would be Respondent's offer. (Tr. 151; GC Exh. 5.)

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On June 14, 2013, the Union presented the Conditional May 2013 CBA Proposal to its members for a ratification vote. The proposal was "overwhelmingly rejected" by the Union's membership again as announced publicly in the Union's Announcement No. 29 on June 14 that Respondent viewed that same day. (R. Exh. 4.)

Respondent took the position that the Union did not explain why the proposal was not ratified and did not request more time to get the proposal ratified, leading Respondent to determine that it was "at the end of its rope" after more than 2 years of bargaining. (Tr. 293; GC Exh. 9.) Similarly, Respondent understood that the Union had just rejected a proposal that was much more favorable to the Union than the resurrected November 2012 CBA Proposal and that the Union's local president and vice-president did not appear to be working hard to support a new contract despite the positive support expressed toward the recently rejected proposal from the Union's entire bargaining committee including its national president.

The Respondent waited until it knew of the June 14 non-ratification vote to notify the Union that the November 2012 CBA Proposal was its last and final offer. This development was conveyed to the Union via a letter sent by Respondent on June 21, 2013. (GC Exh. 9.)

The June 21, 2013 letter sent to the Union by Respondent stated that as a consequence of the failure to ratify the Conditional May 2013 CBA Proposal by the June 14, 2013 deadline, Respondent's final offer to go into effect would now be the November 2012 CBA Proposal. (Tr. 74; GC Exh. 9.) The Union did not respond to this letter and never objected to its terms before meeting on July 9. (GC Exh. 9.)

The union bargaining committee contends that this was the first time that Respondent had informed them that the reversion to the November 2012 CBA Proposal would be considered a final offer though the Union's chief negotiator admitted that he understood that the November 2012 CBA Proposal was Respondent's final proposal when he received the June 21 letter and the Conditional May 2013 CBA Proposal was not ratified. (Tr. 108, 127-127.)

G. The July 9 & 10, 2013 meetings and Respondent's declaration of impasse

<sup>&</sup>lt;sup>4</sup> The Union based this belief on the May 10, 2013 email from Respondent referenced above confirming that the Union was not waiving its right to continue negotiations as they moved forward from the May 2013 ratification vote Tr. 68; GC Exh. 7. I further find that the May 17 jointly negotiated cover letter attached to the Conditional May 2013 CBA Proposal superseded the earlier May emails. Tr. 108, 127-128. Nonetheless, the Respondent reserved the right to claim regressive bargaining which later materialized on July 9 and 10. Tr. 65; GC Exhs. 5 and 7.

Other than Respondent's June 21, 2013 letter to the Union referenced above, there was no contact between the parties from June 14, when the Union informed Respondent that the Conditional May 2013 CBA Proposal had failed to receive a ratification vote, until July 9, when the preset meetings took place in Los Angeles.

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On July 9, the Union caucused on its own prior to meeting with Respondent's representatives and ultimately decided that they needed to discuss with Respondent how to best proceed before they presented any formal proposals to the Respondent.

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When they met, Respondent reminded them of the agreed consequences of rejecting the Conditional May 2013 CBA Proposal and the Union did not object to anything. Casey reminded the Union that the parties were at impasse after two rejected proposal in 2012 and 2013. (Tr. 153, 296.) Casey next said that based on the May 17 conditions and the Union's June 14 non-ratification vote of the May 2013 package, the Respondent's final position in the negotiations was the November 2012 CBA Proposal. (Tr. 296,) Casey then asked Seggi for the Union's response to the November 2012 package and Seggi responded by saying that the November 2012 CBA Proposal is rejected as it "does not work for our members." (Tr. 296-297.) At this time, Respondent once again confirmed that the parties were at impasse and stated that the Respondent would implement the November 2012 CBA Proposal, beginning on July 15. (Tr. 153, 297.)

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The union bargaining committee insisted that they were not at impasse and that they were there to negotiate. Casey further responded to the Union's attempt to negotiate by saying that the Respondent had nothing to communicate after the rejection of the 2012 and 2013 CBA packages but that the Respondent would listen since they were already in Los Angeles as was national Union representative Seggi as a professional courtesy. (Tr. 297-298.)

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On July 9, the Union presented a new proposal it had never mentioned prior to impasse being declared that involved the Conditional May 2013 CBA Proposal plus flat wages with no wage cut, total vacation weeks down from 6 to 5, and one additional personal day, an offer less favorable to the Respondent than the Conditional May 2013 CBA Proposal and the Union's January 2013 proposal. (Tr. 82, 301; GC Exh. 10.) This proposal was regressive and rejected seven of the remaining eight priority proposals found in the November 2012 CBA Proposal. Respondent immediately rejected it, citing that not enough cost saving would occur and that the proposal was not close enough to the November 2012 CBA Proposal. (Tr. 301-302.)

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Later the afternoon of July 9, the Union wanted to see if Respondent was open to considering a new proposal involving a pre-ratified version of the same May 2013 CBA Proposal despite its recent non-ratification vote. Casey responded to the Union's pre-ratified proposal by stating that "that ship has already sailed" meaning that the Conditional May 2013 CBA Proposal was no longer available. (Tr. 217, 298-299.) The Union contends, however, that Respondent's lead negotiator Casey agreed to consider a pre-ratified Conditional May 2013 CBA Proposal presented by the Union, although Casey persuasively denies having said this. (Tr. 299-300.) I find Casey's testimony more believable and reliable on this point as it is consistent with the agreed upon conditions contained in the May 17 cover letter that if the Conditional May 2013 CBA Proposal was not ratified by the Union by June 14, the November 2012 CBA Proposal would come back in its place for negotiation purposes.

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Also, the Union's chief negotiator, Seggi, admits that he suggested the pre-ratified proposal to Casey who rejected it as Casey thought it a bad idea to get the package pre-ratified before knowing whether the Respondent would accept it. (Tr. 86-87, 120, 306.) I find that the Union and not the Respondent suggested that the Union attempt to re-vote the recently rejected Conditional May 2013 CBA Proposal to get a pre-ratified proposal for the Respondent's further consideration.

On the evening of July 9, 2013, Respondent delivered a July 9 letter via email and by hand delivery to the Union repeating its position from the earlier June 21, 2013 letter referenced above and confirming that due to the Union's rejection of the resurrected November 2012 CBA Proposal that they were at impasse and that the November 2012 CBA Proposal was Respondent's final offer (GC Exhs. 9 and 11.)

On July 10, 2013, the Union and Respondent met later in the day. The Union presented another proposal it had designed. In an attempt to increase cost cutting for Respondent, the Union included additional elements of the Conditional May 2013 CBA Proposal in its proposal and added a one percent wage cut in contrast to the six and one-quarter wage cut contained in the November 2012 CBA Proposal. (GC Exh. 12.) This proposal also rejected six of the remaining eight priority proposals found in the November 2012 CBA Proposal. In reply, the Respondent rejected this proposal for being regressive in nature and worse for Respondent than the rejected May 2013 and the Union's January 2013 proposals. (Tr. 305.) The Respondent would accept no proposal much less favorable than the November 2012 CBA Proposal resurrected as a result of the agreed-on conditions for not ratifying the Conditional May 2013 CBA Proposal. Id.

The Union was presenting its July 9 and 10, 2013 proposals working off of the terms of the rejected Conditional May 2013 CBA Proposal while Respondent recognized the November 2012 CBA Proposal to be the appropriate point of reference. Respondent again maintained that the sides were at impasse at the end of the day on July 10. At this time, the Union bargaining committee continued to assert that they were there to negotiate and never stated that they were not willing to make any further concessions yet did not propose any new proposals that were not regressive.

The July 10 meeting ended with the Respondent telling the Union that the parties were still at impasse and that the Respondent was not moving off its November 2012 CBA Proposal notwithstanding the two earlier rejected regressive offers from the Union. (Tr. 307.)

The Union did not present any other proposals after July 10. The Respondent informed them that it would not hold off on the July 15, 2013 implementation date. Nonetheless, Respondent and the Newsroom unit representatives did meet on July 11, 2013, to discuss the Newsroom's successor CBA; however, there was no discussion of the Engineering unit at this meeting.

Between July 10, 2013 and July 15, 2013, the Union did not contact Respondent regarding the Engineering unit. On July 15, 2013, Respondent implemented certain proposals contemplated in its November 2012 CBA Proposal as indicated in its July 9, 2013 letter to the Union. (GC Exh. 11.)

JD(SF)-40-14

#### **CONCLUSIONS OF LAW**

#### A. Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

In this case, credibility is generally not at issue because all four witnesses (two called by the General Counsel and two called by Respondent) provided testimony that generally was corroborated by documentation admitted into evidence and the testimony of other witnesses. The findings of fact accordingly incorporate the testimony of all four witnesses who testified at trial, to the extent that their testimony was based on their personal knowledge and was corroborated by other evidence. To the extent that credibility issues did arise, I have stated my credibility findings in this section and the findings of fact above.

As reflected in the findings of fact above, the parties' chief negotiators, Seggi for the Union and Casey for the Respondent, had conflicting testimony concerning events on July 9 and 10 after Respondent had identified the November 2012 CBA Proposal as its last and final offer, it had been rejected by the Union and impasse had been declared by the Respondent. I find Casey's version of the facts much more believable than Seggi's based on his consistent confident recollection that the Union and not the Respondent suggested that the Union attempt to re-vote the recently rejected Conditional May 2013 CBA Proposal to get a pre-ratified proposal for the Respondent's further consideration. Seggi's testimony was inconsistent and impeached as he testified both that Casey made the proposal while also admitting that he, in fact, made the prepackaged re-voted May proposal. Tr. 17-18, 30, 86-87, 91, 120, 217, 298-300, 306.)

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Seggi also testified incorrectly that the pre-set July 9-11 Los Angeles meetings between the two sides were set exclusively for the engineers' unit while other more reliable evidence supports my finding that the sessions were arranged for both the engineers' unit and the Newsroom' unit whether ratification of the Conditional May 2013 CBA Proposal occurred or not. (Tr. 117-118, 290-295; R Exh. 2.)

# B. The Respondent did not violate the Act when it unilaterally implemented its full and final offer on July 15, 2013

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act when, on July 15, 2013, it unilaterally implemented its full and final offers for the engineers' unit without first bargaining with the Union to a good-faith impasse. (GC Exh. 1(g) at 3 and 4.) Respondent's fourth affirmative defense to the complaint allegations is that it lawfully implemented its proposals because the parties were at impasse. (GC Exh. 1(i) at 2.)

The Union contends that its bargaining committee only agreed to the May 17 conditions because Respondent assured them via earlier emails on May 6 and 10, 2013, that the Union would maintain its right to withdraw any tentatively agreed upon items and introduce new or modified proposals in the event the Conditional May 2013 CBA Proposal was not ratified by Respondent's deadline (GC Exh. 7). Respondent drafted the cover letter and all members of the Union bargaining committee signed off on the document; however, the Union's condition did not appear on the cover letter presented to the Union members with the Conditional May 2013 CBA Proposal (GC Exh. 5). Moreover, the Respondent reserved its right to claim improper regressive bargaining on the Union's part. (GC Ex. 7.) As a result, I reject the Union's contention that it had any right to present the regressive proposals it tendered in July 2013.

Respondent further contends the July 2013 meetings were scheduled because a failed vote would be a major change in circumstance and Respondent would like to receive affirmation from the Union that they acknowledge the enactment of the November 2012 CBA Proposal, while the Union contends that these were scheduled as additional bargaining sessions. I find that the meeting dates in July were scheduled to be used as necessary if the Conditional May 2013 CBA Proposal was ratified or not as Respondent's representatives were planning to be in Los Angeles either way to continue work on the Newsroom CBA.

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Under Section 8(d) of the Act, an employer and a union are mutually obligated "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The duty to bargain may be suspended temporarily, however, where the parties reach a lawful impasse. The party asserting impasse has the burden of proof on the issue. *L.W.D., Inc.*, 342 NLRB 965, 965 (2004); *CalMat Co.*, 331 NLRB 1084, 1097–1098 (2000), *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993); *North Star Steel*, 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992). Further, it is not enough that the party asserting impasse believes that it has been reached. There must be a "contemporaneous understanding" by the parties that further bargaining would be futile. See, e.g., *Newcor Bay City Div.*, 345 NLRB 1229, 1238 (2005), enfd. mem. 219 Fed.Appx. 390 (6th Cir. 2007).

The general criteria for determining impasse are set forth in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968), where the Board held:

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Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations is all relevant factors to be considered in deciding whether an impasse in bargaining existed.

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These factors when applied to this case support a finding that the parties were at impasse. The Respondent and the Union have had a bargaining relationship for 3 decades and had entered into a number of multiyear CBA's - the last being the 3-year CBA in 2008. Thus, the bargaining history favors a finding of impasse. Further, the parties met 28 times over 26 months, corresponded, and had telephone discussions, with both making proposals and counterproposals. Indeed, there is no contention that any of the Respondent's proposals were unlawful or that the

Respondent otherwise bargained in bad faith. While the parties had reached tentative agreement on a multitude of issues, many remained open, the most important of which was compensation and length of workday, meal periods, holiday and personal days, and the timing of the elimination of a 6th vacation week. Objectively, the lengthy negotiation history evidences that both parties were at the end of their respective negotiating ropes as both sides should have known that the November 2012 CBA Proposal was the appropriate last and final offer from Respondent yet the Union did not abide by the agreed terms of the May 17 cover letter after it rejected the Conditional May 2013 CBA Proposal and, instead, presented regressive proposals on July 9 and 10.

Finally, the contemporaneous understandings of the parties support a finding of impasse. The Respondent expressed its position that the negotiations were at impasse at the start of the July 9 meeting after the Union rejected the November 2012 CBA Proposal a second time as confirmed in its letter of July 9. Moreover, Respondent's conduct beginning with its May 17 cover letter and continuing with its June 21 and July 9 letters was consistent with the May 17 cover letter conditions agreed to by the Union's representative bargaining committee. The Union either knew or reasonably should have known that the parties were at impasse when it ignored the consequences flowing from its June non-ratification vote of the Conditional May 2013 CBA Proposal. At the July 9 and 10, 2013 meetings, the Union refused to let go of the Conditional May 2013 CBA Proposal and negotiate around the resurrected November 2012 CBA Proposal as formerly agreed to in May.

Nevertheless, while declaring impasse, the Respondent left the door open to consider a new position when on July 9 Casey agreed to listen as a professional courtesy and the Union asked if the Conditional May 2013 CBA Proposal was still available despite it not getting ratified by June 14. As stated above, Casey informed the Union that the deal had expired on June 14, and that he had no authority from the Respondent to accept anything but the November 2012 CBA Proposal as a repeated reminder of the May 17 cover letter agreement the two sides had arranged as a consequence for the Union not ratifying the Conditional May 2013 CBA Proposal.

Therefore, I find that Respondent remained willing to continue to bargain with the Union in an effort to break the impasse. If the Union wished to break the impasse, it should have submitted a package proposal to Respondent in response to the November 2013 CBA Proposal and not something regressive in nature as each of the Union's proposal were on July 9 and July 10. I further find that Respondent was willing to schedule another bargaining session on July 11 had it received a package proposal from the Union which contained significant changes from the Union's earlier regressive proposals on July 9 and 10. Consequently, I further find that at no time after Respondent's July 9 declaration of impasse did the Union put forth anything that created a new possibility of fruitful discussion to break the impasse.

Though the question of impasse here is difficult, for the reasons given above, I conclude that the Union's bargaining tactics made reaching an agreement a virtual impossibility. I conclude that the Respondent had no reason to believe that the Union would change tactics in the foreseeable future and therefore was permitted to declare impasse and implement its final offer. I conclude that the Respondent did not bargain in bad faith and did not violate the Act by declaring impasse in negotiations and implementing its November 2012 CBA Proposal on July 15, 2013. Accordingly, I conclude that the complaint should be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.<sup>5</sup>

**ORDER** 

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The complaint is dismissed.

Dated, Washington, D.C., August 12, 2014.sd

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Gerald M. Etchingham Administrative Law Judge

<sup>&</sup>lt;sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.